RECORD No. 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Petitioner

v.

LUBLIN, McGAUGHY AND ASSOCIATES,
et al.,
Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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STATEMENT OF THE CASE

The issue in this case is whether sub-professional employees of a firm of architects and consulting engineers are engaged (a) in commerce, or (b) in the production of goods for commerce, within the meaning of the Fair Labor Standards Act, as amended.

Unless said employees were so engaged during the period of time covered by the complaint filed by the petitioner (R. 12[illegible] et seq.), the District Judge has correctly dismissed the complaint and refused to enjoin certain alleged violations, and the United States Court of Appeals for the Fourth Circuit has correctly affirmed the trial court's decision.

The burden of proof is upon the petitioner.

PARTICULAR QUESTIONS INVOLVED

A. "ENGAGED IN COMMERCE?"

1. Are stenographic and clerical employees of a Virginia firm of exempt licensed professional men, in this case architects and engineers (but doctors or lawyers would be equally apposite), engaged in commerce within the Act? Where such employees' duties are substantially no different from the duties performed by stenographic and clerical employees in any medium-sized professional firm, is the answer to the previous question altered by the fact that a Virginia firm maintains a branch office in Washington, D. C., and has been associated with foreign nationals in certain overseas architectural and engineering contracts undertaken for the U. S. Government?

2. Are field men whose work is located in Maryland engaged in commerce because they cross the District of Columbia line on their way to work, and again in returning from work?

3. Are draftsmen engaged in commerce because reproductions of drawings on which they worked are sometimes subsequently transmitted across state lines by others?

B. "ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE?"

Are the plans and specifications for a particular construction project, drawn for a specific client, "goods" within the meaning of the Act, so that draftsmen and other sub-professionals aiding an exempt professional group in the preparation of such plans and specifications can be said to be engaged in the production of goods for commerce?

QUESTION IMPROPERLY FRAMED IN PETITIONER'S BRIEF

Under the pretext of setting forth the question presented, the petitioner's brief (page 2) *states as a fact* that respondents' "non-professional employees . . . . work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities . . . .". Far from being a fact, this is an *issue.** The question is, first, whether the employees *are* engaged in such activities, and secondly, if so engaged, whether directly or remotely. Moreover, it is an issue which both courts below have resolved in respondents' favor, contrary to the implications of petitioner's "question presented".

Respondents emphatically deny that any of their employees, during the period covered by the complaint, have worked "on the plans and specifications for projects for improvement of interstate instrumentalities or facilities," within the meaning of the Fair Labor Standards Act, or otherwse.

Also on page 2 of petitioner's brief is the wholly unwarranted implication that respondents' non-professional employees play some role in regularly trans-

* See Stip. No. 4, R. 11a.

mitting drawings, plans and specifications across state lines. All parties concede that it is the activity of the employee that governs coverage, and the record is bereft of evidence that the "regular duties" of respondents' employees include any of the activities described as *fact* in petitioner's framing of the "question presented."

STATEMENT OF THE FACTS

A. CONCERNING PETITIONER'S PRESENTATION

In his zeal to prevail in what would become a landmark case, involving employees of all professional firms of every kind, the petitioner has consistently in all three courts grossly overstated the facts relating to the so-called "interstate" and "multi-state" character of respondents' business. By constant repetition of the catch-words and phraseology of interstate commerce, and by doggedly applying interstate nomenclature to respondents' operations, petitioner obscures the essential nature of the employees' daily routine activities. For example:

1. It is stated on pages 2 and 4 of petitioner's brief that respondents' business relates essentially to "industrial" projects. Of the 263 projects undertaken by respondents (R. 18a-29a, incl.), only four* could conceivably be called "industrial". Of these four, number 898 can be eliminated, since the project designed by respondents was abandoned by the client, and will never be constructed (R. 132a). The remaining three projects, constituting approximately 1% of the projects undertaken, are of such trivial nature that they merit no consideration. Moreover, the evidence utterly fails to dis-

* Job Nos. 805, 898 (including 898-1), 954 and 968.

close whether they constitute new construction which is not covered by Fair Labor Standards Act, and whether they involve interstate commerce in any way whatsoever. In any event, petitioner's brief would be much more accurate by saying respondents' practice is essentially nonindustrial.

2. Petitioner's brief proceeds on the assumption that military projects, concededly an important segment of respondents' business, may be equated with interstate commerce. Obviously, the converse is true. Except where the contrary be expressly shown by the evidence, military installations must be assumed to be instrumentalities of war, and *not* of commerce. For example, it is solemnly stipulated between petitioner and respondents (Stip. No. 12, R. 16a) that the Naval Air Station installation at Oceana, Virginia, is "a Naval jet air base, part of the East Coast defense system for intercepting enemy aircraft." The record contains not even a scintilla of evidence that this *new* and still incomplete instrumentality of war is even remotely associated with interstate commerce. Yet respondents must submit to repeated references in petitioner's brief to "airfields", "airplane facilities", "hangars", "military bases", etc.

3. In the muddled mixture of references to respondents' non-military projects, the vast majority of which are accomplished in the Norfolk office for Virginia clients and involving Virginia construction, the application of the "new construction" doctrine is glossed over as though this Court had never existed. This well known doctrine, discussed here as recently as 1954 in *Mitchell v. Vollmer,* 349 U. S. 427, has apparently been overruled or overlooked by petitioner in favor of his "liberal construction" doctrine. While petitioner

pleads at least three times in his brief for a "liberal construction", he never once alludes to the "new construction" doctrine, by virtue of which the greater part of every architect's work is placed beyond the coverage of the Act.

4. It was expressly conceded by petitioner's counsel in the trial court (R. 35a) that the transportation of plans and specifications across state lines, so often referred to in petitioner's brief, is accomplished almost exclusively by the Army and Navy in connection with military projects, not by respondents and their employees. With respect to non-military projects, uncontradicted testimony of respondent John B. McGaughy demonstrates that only about 2% of the bidders on private projects are from out-of-state (R. 61a, 62a). Indeed, in a number of private projects, the contracts are let without solicitation of bids (ibid). Since private projects constitute only 40% of the work of the Norfolk office and 15% of the work of the Washington office, it would appear that less than 6/10 of one per cent of the completed plans and specifications prepared by respondents' employees are actually transported across state lines by or for respondents.

5. Petitioner's brief attempts to portray a picture of drawings and other architectural and engineering documents streaming back and forth between Washington and Norfolk. Petitioner's brief overlooks the following testimony elicited by his own counsel upon direct examination: "As a general rule, the work in the Washington area is done by the Washington office. That is the basic concept of the organization. Whereas, the work in the Norfolk area is done by the Norfolk office. We tried to follow that wherever possible. There

are exceptions" (R. 69a). This is a candid, succinct and logical picture of respondents' operation which petitioner attempts to inflate and distort into a gigantic "multi-state" industrial enterprise.

6. Respondents are long-time residents of Norfolk, Virginia, and each resides there with his family. Prior to the formation of the partnership, Mr. Lublin practiced architecture in Norfolk and Mr. Marshall was employed by him. Similarly, Mr. McGaughy practiced engineering in Norfolk and Mr. McMillan was employed by him. The present firm emerged when Messrs. Lublin and McGaughy became associated as partners and brought into the firm their respective said employees as junior partners. The true size of respondents' firm and scope of their business, while gratifying to them as a reflection of their recognized professional ability, is modest in comparison with the proportions outlined by petitioner's brief.

7. The inferences attempted to be drawn by petitioner from the job-list furnished by respondents in no way convey an accurate picture of respondents' activities. In the two year period covered by the complaint, not more than 8 of 263 projects were related to construction proposed for erection in the State of Maryland. The record shows that only the Washington Suburban Sanitation project was of major consequence; that none of the eight Maryland projects involved interstate commerce, and several of them were never built. Similarly, the amount of work done on projects to be erected in North Carolina and other states outside Virginia is negligible. It may be conservatively estimated that, except for the aforesaid suburban sewer

work, associated with local residential construction, 95% of respondents' activities concerned Virginia projects.

8. The appendix contained on pages 52 *et seq.* of petitioner's brief is a lamentable effort to confuse this Court by offering in massive form a list of allegedly "interstate" projects which, taken individually, can be absolutely demonstrated to contain no elements requiring coverage of respondents' employees under the Fair Labor Standards Act. We draw little solace from the fact that petitioner has finally abandoned his contention below concerning respondents' work on Old Cape Henry Light House, an historic shrine which was retired from service 40 years ago. The list primarily contains military projects for which the record contains not the slightest evidence of interstate commerce. The turnpike projects listed there have long since and notoriously been abandoned by the public authorities concerned with them, and, had they been built, would have constituted new construction of brand new road systems. Mere mention of the Oceana Radio Station is not evidence of commerce. The "Advance Planning Report" which respondents prepared for such new station does not in any court of law constitute engagement in commerce by the respondents' employees who may have worked on it. How much more remote can one get from commerce than an "Advance Planning Report" prepared by independent consultants for a new facility at a new location? (R. 70a). As for television station WAVY, it had not commenced to broadcast or even yet been licensed, so new was this company when respondents undertook a small job for it! Clearly, no commerce was involved. Again, sewer and water de-

signs are mentioned in this appendix without acknowledgment of uncontroverted evidence showing the purely residential character of the work.* A brand new bus terminal can hardly constitute repair, enlargement or extension, and the "small remodeling job" done on another terminal "five or six years ago" is not covered by the complaint filed by the petitioner. The survey of certain buildings at the Norfolk Naval Shipyard was made by a professional engineer, exempt from the Act, to indicate what repairs were recommended. In none of these projects do respondents or their employees engage in any construction, repairs or site supervision, so that even if the latter activities were held to constitute commerce, respondents' employees' activities are far too remote therefrom to make them a part of such commerce.

9. Petitioner's brief refers to "interstate travel" of respondents' employees. The only evidence of such travel by sub-professional employees involves the field party engaged in the Washington Suburban Sanitation work, which was purely local and residential in nature. The duties of these employees were performed entirely in and around Hyattsville, Maryland, where data was collected for the new designs. They travelled from Washington to Maryland only for their personal convenience in obtaining transportation to the jobsite, and not for the convenience or at the direction of respondents (R. 135a).

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* R. 136a. Testimony of John B. McGaughy:

Q. These are sewer designs for new housing projects?
A. That is correct; water and sewer for housing projects.

B. THE FACTS IN PROPER PERSPECTIVE

Neither the Facts of the Case as Disclosed by the Record, nor the Law of the Cases Cited Bears Out the Conclusions Reached by the Petitioner.

By deftly lifting phrases, clauses and sentences out of context from the two opinions below, the stipulation, and the testimony of witnesses, and by interspersing these quotations with words such as "undiputed" and "undeniably", petitioner paints a picture of a vast empire of architects and engineers who practice their profession to the extremities of the earth. Nothing could be further from the truth.

Respondents are as *local* as could any professional firm be which maintains a branch office in the nation's capital and which has some foreign connections.

They are *consulting* architects and engineers, exclusively occupied in rendering professional services. In that capacity, they engage in creative design work and in counselling and advising. Plans, specifications, and correspondence are the standard media of their profession for transmitting their ideas, advices, and designs (R. 130a). They do not manufacture or construct anything. Respondents' sub-professional employees include field parties which survey land, certain of the draftsmen, and three or four stenographers. The field personnel gather data which respondents use as a basis for their designs and advices. The draftsmen reduce to graphic and descriptive form the designs and advices. The stenographers do exactly what stenographers do everywhere: write letters to parties within and without the state, take dictation, and transcribe data. Special knowledge and training is required of

virtually all the employees, and even the draftsmen, with few exceptions, are regularly engaged in creative and original work.

Norfolk field men almost never work outside of Virginia. Washington field men perform entirely in the Maryland suburbs of Washington. For the latter, the Washington office is merely a place of departure for work. The party chief has the sole responsibility of turning in the data at the office where it is recorded by a plotter (R. 5a, 134a, 135a).

Generally speaking, the Norfolk office personnel works on projects to be constructed in Virginia. Exceptions are "standard plans" and occasional work on segments of projects primarily done in the Washington office.

The work of the Washington office is largely (85%) for nearby government agencies, several of which are dealt with at offices outside the District of Columbia (R. 13a, Stip. No. 7).

The alleged interstate characteristics of respondents' profession may be summarized as follows:

Interstate movement of personnel—is limited exclusively to partners and associates, with the exception of Washington field men (R. 8a). The partners and associates are admittedly exempt from the Act. FLSA Sec. 13 (a) (1)*. The work of the Washington field men, for all practical purposes, is limited to residential suburban sewer and water line location surveys in Maryland. They assemble for their own convenience at the Washington office, though only the party chief is required to do so (R. 134a, 135a).

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* Title 29, U.S.C.A. Sec. 213 Exemptions
"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity....."

Communication and correspondence—there is correspondence from both offices which crosses state lines. There is telephone communication between the two offices by private wire. Plans, specifications and drawings are occasionally transported across state lines from each office. Far from being the essence of respondents' business, these things are merely *incidental* thereto.

Military projects—some government projects may be located outside the state or district in which the respondents' work is performed. "Standard plans" for a warehouse that "have not been used to date" (R. 43a) furnish an example of this. However, there is no evidence that any government work done by respondents embraces an instrumentality of commerce (R. 9a). To the contrary, it would appear, and should be presumed in the absence of conflicting evidence, that these were instrumentalities of war, or in any event, not of commerce. On military projects, respondents render no supervision whatever (R. 15a, Stip. No. 11).

Non-military projects—were, with only one or two exceptions, performed in the state or district where the plans were delivered and the structure was proposed to be erected. This was virtually all new construction, in any event.

Factually, then, contrary to the oft-repeated language of petitioner, respondents' profession is not one of "interstate character in almost every aspect." The evidence undoubtedly shows, as petitioner declares on page 20 of his brief, that some drawings, specifications, and plans are transmitted across state lines, but as petitioner's attorney developed at the trial (R. 45a), almost all of this transmission was done by Army and

Navy officials with plans that had been turned over to them by respondents after the completion of respondents' services.

REBUTTAL

(1) The Preparation of Plans and Evidence of Other Work Done by Respondents' Employees Does Not Bring Them Within the Act's "In Commerce" Coverage.

Petitioner cites seventeen cases on pages 21 and 22 of his brief in support of his position that employees of respondents are engaged in commerce. An examination of these cases shows that in every instance, the employees were engaged in the repair, improvement, or extension of existing instrumentalities of commerce. There is no evidence whatsoever in this record of a single instance where respondents or their employees have been engaged upon an existing instrumentality of commerce. *Mitchell v. Vollmer,* 349 U. S. 427, is cited no less than ten times in petitioner's brief in support of the contention that respondents' employees are engaged in commerce. In that case, Mr. Justice Douglas said:

> "The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity. See *McLeod v. Threlkeld,* 319 U. S. 491, 497. Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act, as we held in *Fitzgerald Co. v. Pedersen,* 324 U. S. 720. And we think the work

of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.*"

* "The construction work held in *Murphey v. Reid*, 335 U. S. 865, not to be under the Act was the building of a Navy base, not the improvement of a facility or instrumentality of interstate commerce."

Unless widening streets on a naval operating base in the vicinity of the motor pool and post exchange, or extending and paving plane taxiways and parking aprons at a navy jet air base (R. 16a, Stip. No. 12) constitutes repair, improvement or extension to an existing instrumentality of commerce, then we submit that the law of *Mitchell v. Vollmer* favors the decision rendered herein by the two lower courts. Certainly the petitioner can get small comfort from either the majority or dissenting opinion of that case.

The case of *Laudadio v. White Construction Co.*, 163 F. (2d) 383, cited four times in petitioner's brief, has this to say:

> "If the field were used solely to train air personnel of the Navy, it would seem to be an instrumentality of war rather than an instrumentality of commerce."

And in the case of *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100, the Court held that employees working on armed cargo transports were covered by the Act, while those working on warships were not working on instruments of commerce and were not covered.

This record discloses not one instance of any work of a commercial nature done by the respondents for the Navy, Army, or Air Force; wherefore, the petitioner

has failed to carry his burden of proof. Certainly the armed forces are not *per se* engaged in interstate commerce!

We submit with confidence that the statement on page 24, note 6, of petitioner's brief, to the effect that surveys show that "most of the firms in this field do not limit their operations to any one state" and that "another major source of business of such firms is highway construction", is no evidence whatever that respondents are anything other than a local architectural and engineering firm, or that its employees are engaged in commerce. Neither does reiteration of the allegation that the District Court and the Circuit Court "missed the point" prove that these courts erred in distinguishing this case from *Mitchell v. Brown Engineering Company*, 224 Fed. (2d) 359. In reversing the Iowa District Court in the *Brown* case, the Eighth Court of Appeals based its decision upon duties of the defendants and their employees as "resident engineers" on existing interstate highway repair projects. Even if that case is correctly decided, it must be distinguished from this one on the facts. In the *Brown* case, there is evidence of a major effort by Brown Engineering Co. *directly* relating to the *extension of existing interstate highway facilities* by virtue of constant, on-site, resident-engineer control of the job, i.e., actually direct participation in the construction itself, including inspection of all materials delivered to the job-site. Lublin, McGaughy & Associates have *not* engaged in such activity. Judge Hoffman, in distinguishing the *Brown* case, quotes the following language of the Eighth Circuit as being "the gist of the determination":

"In this case the activity of defendant's employees was in connection with the repair, alteration and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job-site as 'resident engineer'." (R. 7a)

(2) Having Stenographers Write Letters Beyond the State; Having Employees, Who Live in One State and Work in Another; Having Clients Who Advertise for Bidders Across State Lines, Do Not, of Themselves, Constitute the Employees' Engagement "In Commerce" Within the Act's Coverage.

If the mere fact that a stenographer working for a professional firm writes letters to points without the state causes her to be engaged in commerce, then there is hardly a stenographer in the land who is not engaged in commerce. Petitioner's theory on this subject was rejected in both Courts below, but is again urged here (Petitioner's Brief, p. 34). In his opinion below, Judge Hoffman said: "Stenographers and law clerks or apprentices in legal offices may ultimately come within the Act as their daily work requires them to handle correspondence, legal briefs, and other documents which are continuously being forwarded across state lines. When such a point is reached, the Act will be all-inclusive, and the employees of every business or profession will be subject to its provisions" (R. 8a).

The case of *McLeod v. Threlkeld*, 319 U. S. 491, is, we believe, still the law concerning employees who happen to have duties which may be incidental to interstate commerce. The Court held in that case that the Act covered only those employees in the *channels* of

commerce, as distinguished from those who merely *affected* that commerce. "The test under the present act, to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

We submit that the evidence in this case does not meet this test. Nowhere does it appear that any of the employees for whom coverage is sought is a part of the movement of commerce between the states.

It seems to be generally accepted that the place in which an employee performs his work has nothing to do with the interstate commerce aspects of a given situation. In the case of *Bruce, et al v. J. Rich Steers, Inc., et al*, 60 F. Supp. 668, the Court said:

> ". . . . it is not the location but the nature of plaintiff's occupation which is determinative."

In *Oliphant v. Kaser* (Iowa, 1945), U. S. Dist. Ct., 10 Labor Cases, No. 68,571, the Court said that:

> "Plaintiff, by signing the contract of employment, riding, dining, and sleeping at defendants' expense from Iowa to the point of work in another state, is not on account thereof 'engaged in interstate commerce' any more than one chattel being shipped from one state to another is deemed to be 'engaged in interstate commerce'."

Respondents have found no cases contradicting the foregoing interpretations of the Act, nor have any cases holding the contrary been cited by petitioner.

The evidence shows that both the Army and Navy, after completion of respondents' professional contract,

would, without help or participation from respondents, mail plans across state lines to contractors for bids. This was standard procedure. But could such activity of the military be imputed to the employees of the respondents? We think not. After the respondents have completed their assignment by turning over the plans and specifications to the District Army Engineers (R. 46a), it is utterly unreasonable to charge the respondents with interstate movement because the District Engineer sends them to contractors or Army offices outside the state.

Petitioner cites many, many cases — practically every modern decision involving interstate commerce! It is pointless to deal with them individually, since they are clearly irrelevant, as Judge Soper amply demonstrated in his opinion below (e.g., See R. 150a).

(3) Plans and Specifications Are Not "Goods" as Used in Section 7(a) of the Fair Labor Standards Act of 1938 and Amendments Thereof (R. 116a).

It is to be noted that this theory, advanced as Argument A by the Secretary of Labor in the District Court and the Court of Appeals, has here been relegated to Argument C, or the third line of attack.

In contending that respondents' employees are producing "goods" for commerce, the petitioner is strictly pioneering. The Department of Labor has yet to produce a single case holding that the preparation of plans and specifications constitutes the production of goods for commerce. Even in the *Brown Engineering Co.* case, elsewhere herein discussed and distinguished, the Court did not find that plans and specifications are "goods". Cases in which they (or similar work) are

specifically declared not to be goods in the sense that they could be the subject of "production of goods for commerce" are:

McComb v. Turpin, 81 F. Supp. 86;
Scholl v. McWilliams Dredging Co., 169 F. (2d) 729;
Kelly v. Ford, Bacon and Davis, 162 F. (2d) 555;
Laudadio v. White Construction Co., supra; and
Bozant v. Bank of New York, 156 F. (2d) 787.

The Department of Labor has this to say in its own Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, Code of Fed. Reg. (776.19(b)(2)):

> "On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce'. Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a 'local firm'." (Citing *McComb v. Turpin*, supra).

Since the Interpretative Bulletin concedes that an employee of a local architectural firm is not covered, even when working on "*alteration* of buildings . . . . used to produce goods for interstate commerce", it is sophistry for petitioner to contend that the same employee, doing the same work, is covered by the Act merely because the building is located in another state.

Surely petitioner knows that the activity of the employee controls, not the physical location of the building.

In this regard, Congress in its 1949 amendments to the Act, curbed judicial expansion of its meaning in regard to production workers whose work was "necessary" to the production of goods. The 1949 amendments substituted for *"necessary"* the words *"closely related"* and *"directly essential"* (italics supplied).

McComb v. Turpin, 81 F. Supp. 86, is a case in which the facts are remarkably close to the facts of the case at bar. Within the year preceding trial, a Baltimore architecture and engineering firm had projects located in Pennsylvania, Virginia, and some other states, as well as Maryland. "The nature of such projects included a sewage treatment plant, alterations to a paint plant, designs for conveyor galleries in control towers, and similar engineering or architectural projects." It was stipulated that the Turpin firm would continue ". . . . . to render professional services in connection with many kinds of structures and equipment, whether for original construction or for alterations or additions, and whether the clients owning or operating said establishments are engaged in interstate commerce or the production of goods for commerce or not. Mostly their services relate to the original construction of buildings rather than to additions or alterations. The plaintiff has filed as exhibits illustrative of the defendants' drawings and specifications, a familiar type of blueprint for an engineering or architectural project, and a voluminous set of specifications for a client to be used by it for obtaining bids for a particular project; and also a re-

port to a client, in the nature of an audit or appraisal of the value of work completed and still to be done by a contractor or sub-contractor."

Using italics for emphasis, Judge Chestnut makes it clear that the government did not even contend Turpin's employees were engaged in interstate commerce. It was actually conceded by the government that the employees were *not* engaged in commerce, a concession which flows naturally, said the Court, from the decision of the Supreme Court in *McLeod v. Threlkeld*, 319 U. S. 491, 497, 63 S. Ct. 1248, 87 L. Ed. 1538.

The opinion realistically and logically points out that, "although the test as to coverage of the Act is the nature of the activities of the employees rather than that of the employer, it is legally difficult to see how employees could be engaged in either interstate commerce or the production of goods for commerce unless the employers were so engaged."

Judge Chestnut, with impressive clarity and reason, then explained why plans, drawings, and specifications are not goods. "They are only a physical embodiment in words of professional conclusions . . . . .". The opinion continues in the words of Justice Holmes in *Fed. Baseball Club of Baltimore vs. National League of Professional Baseball Clubs*, 259 U. S. 200, 208, 209, 42 S. Ct. 465, 466, 66 L. Ed. 898, 26 A.L.R. 357, ". . . . 'personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation we have mentioned takes place . . . . a firm of lawyers sending out a member

to argue a case, or the Chataqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State'.

"Certainly the word 'goods' could not be construed to include professional advices *and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given*" (italics supplied).

Apparently, the petitioner is asking this Court to hold that plans and specifications cannot be distinguished from telegrams for the purposes of this Act, and presumably that Lublin, McGaughy & Associates cannot be distinguished from the Western Union Telegraph Company. Both Judges Soper and Hoffman in their opinions in this case considered the case of *Western Union Telegraph Co. v. Lenroot,* 323 U. S. 490, and concluded that plans and specifications are not "subjects of commerce"; that telegrams are obviously and properly goods, based on the relationship of the message to Western Union as a unit of work rather than an idea. Obviously, Western Union is not a learned professional man giving his own professional advice to a particular *client* pursuant to that client's request, and its message is not professional advice.

In the oft-quoted case of *Bozant v. Bank of New York* (supra), 1946, 156 F. (2d) 787, Judge Learned Hand said:

> "A lawyer who in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within Section 203(j); *and the same is true of the correspondence of a broker and a banker.* The definition of 'goods' in 203(j) might literally go so far even as that; but it would be unreasonable to the last de-

gree to suppose that Congress meant to cover such incidents of a business *whose purpose did not comprise the production of 'goods' at all.*"

See also *Kelly v. Ford, Bacon and Davis,* 162 F. (2d) 555.

This aspect of petitioner's contention has been treated with piercing clarity in the Court of Appeals below as follows (R. 148a-149a):

"The practical distinction between the business of interstate communication by telegraph and the activity of making plans and drawings which are used merely as guides for building construction, is so obvious as not to deserve further discussion. Nor does the Powell case* support the government's position. It does show that the term "goods" in Section 203(i) of the statute is not limited to those bought and sold, but its holding that munitions of war are "goods" in no way tends to show that such articles as plans and specifications, which possess markedly different characteristics, are also "goods" in the statutory sense.

"The defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained. They were not employed to manufacture documents to be sold or transported in interstate commerce but to give professional advice and assistance which of necessity was given permanent form as plans or specifications so as to be available for guidance and reference. Clearly such plans were not "goods" in the ordinary case, although it is possible to conceive a situation in which standard plans or blueprints for building con-

* Judge Soper here refers to *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, which he readily distinguishes from the case at bar.

struction might be prepared for transportation or sale in such a way as to fall within the coverage of the Act. That, however, did not happen here. The copies of the plans that were made and sent out for the convenience of the clients and their bidders were not transported as subjects of commerce but in order to show the interested parties the sort of construction that was required; and the mere fact that the documents crossed state lines did not alter their inherent nature."

We sincerely believe that if plans and specifications are going to become "goods" under the Act, they should so be made by legislative fiat rather than judicial construction.

ARGUMENT

Interstate activity, in order to put an employee "in commerce", must be a substantial part of his work week, and not merely "an incident of interstate business." *Kelly v. Ford, Bacon and Davis,* 162 F. (2d) 555 (C. A. 3, 1947). The entire *Kelly* opinion bears on the case at bar. In it, Judge McLaughlin stated:

> "Merely because an occupation is indispensable in the sense of being included in the long line of causation which brings about so complicated a result as finished goods does not bring it within the scope of the Fair Labor Standards Act." *10 East 40th Street Building v. Callus,* supra. 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1606, 161 A. L. R. 1263.

Although the employee in the Kelly case apparently sent and received several hundred pieces of correspondence through interstate mail, the Court found them to be "an incident of intrastate business," and that

"the mere writing of letters or the drawing of papers which have no value of their own except as records, are not to be counted." The opinion made a point of stating that the facts (construction of an aircraft plant) did not even present "a border line case."

Collins v. Ford, Bacon and Davis, Inc., 66 F. Supp. 424, involved a draftsman employed by the same defendant, working on plans and specifications which were transmitted by the defendant to contractors both in and out of Pennsylvania for bids, execution of work, etc. The District Court held that Collins, the draftsman, was not "engaged in commerce", and Judge McLaughlin expressly approves that decision by referring to it in the Kelly case. Similarly, see *Damon v. Ford, Bacon and Davis, Inc.*, D. C., E. D., Pa., 62 F. Supp. 446, concerning the same defendant's chief field time checker.

If coverage is found in the instant case, the federal judiciary can expect to be busy for the next few years deciding which architects are, and which, if any, are not, engaged in interstate commerce, and then which lawyers, and ultimately which doctors. For there can be no clear-cut line drawn, nor any convenient criteria established to separate the covered firms from the 'local' firms, if the province of the professions is once invaded by judicial construction.

The instant case offers great hope to the Labor Department's attack on the professions, because the respondents' firm has several interstate markings. There are interstate offices, mailings, telephone conversations, and journeys. As put in evidence by the petitioner, military aircraft operating from bases where respondents' employees gathered data performed interstate flights.

Agencies using respondents' plans undoubtedly shipped them across state lines. All in all, the word "interstate" can be used many times in discussing the evidence in this case. However, this does not constitute commerce, and especially interstate commerce. If respondents' employees are held to be covered, the petitioner will have succeeded in placing the entering wedge in every architect's door, not to mention other professions. No architect or engineer today can run his office without interstate correspondence and travel.

It is submitted that interstate commerce contemplates *production, manufacture, transportation, shipment, or construction* as the primary activity of the employer. Purely professional services preliminary to any of those activities, or remotely connected therewith, or utilizing the same from time to time as an incident of local business, do not constitute interstate commerce. It is admitted that respondents' personnel in the direct employ of a *construction* firm might perform superficially similar work and "be engaged in commerce."* But the similarity of work done would be only superficial, the involvement in commerce would be far more direct, and the employer's operations would be, in the strict sense of the word, non-professional and free of the type of regulation required by Virginia law for professions (R. 126a, et seq.). Professions, whether or not practiced across state lines, are licensed, regulated, and controlled by each state, and are regarded by the Act as local business. Congress has plainly indicated its purpose to leave local business to the protection of the states, and did not exercise in this Act the full scope of

* See last question on R. 133a, and answer on R. 134a for vital distinction between function of contractor's draftsmen as contrasted with function of respondent's draftsmen.

the commerce powers. It could have gone further, but it did not see fit to do so. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 62 S. Ct. 1116. In fact, as previously stated, in 1949 it narrowed the original scope of the Act.

In order to prove the interstate nature of respondents' activities, petitioner cites cases of the Supreme Court holding that North American Company, Associated Press, Underwriters Association, International Boxing Club of New York, and other national concerns are by their very nature interstate in character. We submit that these authorities are not appropriate. In holding that the great North American Company was engaged in interstate commerce and, therefore, subject to the orders of the S. E. C. (a case cited by the petitioner) in 327 U. S. 686, at page 694, the Supreme Court said:

> "North American is more than a mere investor in its subsidiaries. . . . . It is the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia . . . The mails and the instrumentalities of interstate commerce are vital to the functioning of this system. *They have more than a casual or incidental relationship.* (Italics supplied). Such interstate commercial transactions involve the very essence of North American's business."

It seems to us beyond dispute that Congress never intended the Fair Labor Standards Act to extend to the limits herein alleged by the petitioner, and that the cases cited under the Sherman Act, Mann Act, and Fugitive Felon Act are entirely out of character. Let us be among the first to admit that parties who allow diseased cattle to roam across state lines, who engage

in the transportation of women across state lines for immoral purposes, and those who engage in writing insurance on a national level are definitely creatures of interstate commerce. We believe that the comparison between the businesses of those parties and the respondents simply will not stand up.

CONCLUSION

The history of the Fair Labor Standards Act is somewhat like the old story of a stone cast into a pond. Not only does the stone produce a splash, but it causes ripples which may eventually touch every shore. The ripples of the Fair Labor Standards Act are now lapping at shores that the congressman who threw the original bill into the hopper could never have anticipated. The coverage originally intended by the Act, despite an intervening 1949 Congressional amendment to restrict its application, has been steadily extended in ever widening circles. In 1939, the Labor Department would not have dared to bring this action, so obviously far afield is its purpose from the properly defined scope of the original Act.

However, spurred on by its success in litigating cases of borderline coverage under the Act, the Labor Department, with its pioneer spirit, is attempting to land on the heretofore untouched shores of the professions. The enforcement history of the Act leaves no room for doubt that if any one profession is covered, then other professional groups will inevitably be included.

Finally, we respectfully call the Court's attention to the fact that the petitioner, not content with its stipulation, put on seven witnesses. These witnesses were

listened to, observed, and questioned by the trial court before it concluded that respondents' employees are not marked for coverage; that petitioner failed to prove its case. This, we submit, is entitled to weighty consideration. The Trial Court was, in turn, unanimously affirmed by the Court of Appeals.

There can be little doubt that the Fair Labor Standards Act was not promulgated to obtain salary increases for employees earning as much as the employees here (R. 140a, 141a). This was not "the mischief to be remedied by the Act . . . . ." as expressed by Judge Chestnut in *McComb v. Turpin*, supra, Likewise, there can be little doubt that the Congress did not intend to seek coverage of the employees of professional architects and engineers not engaged in construction projects. We believe that none of the cases cited prove that the employees here were engaged in commerce or the production of goods for commerce. We urge the Court to affirm the findings and decisions of the courts below.

Respectfully submitted,

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